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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HARVEY S. PEELER,
Petitioner,

vs.

SPARTAN RADIOCASTING, INC.
AND ALLAN RAY TEDDER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SOUTH CAROLINA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

CLARENCE S. NORRIS
Counsel of Record
26 North Main Street
Sumter, SC 29151
(803) 778-6531

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QUESTIONS PRESENTED FOR REVIEW

1. May the South Carolina Supreme Court interpret the First Amendment as imposing burdens on a public figure plaintiff greater than the burdens imposed by the decision of the United States Supreme Court?

2. May a state court – in conducting a de novo review of whether the record contains clear and convincing evidence of actual malice in a public figure defamation case – reject the jury's finding of falsity, require that falsity be proven by clear and convincing evidence, reject the jury's credibility determinations, and then rule that the plaintiff's failure to prove falsity precludes a finding of actual malice?

3. Where a television reporter splices video interviews with citizens to make it appear that the citizens believe that a public figure plaintiff is involved in criminal conduct – even though the citizens expressly told the reporter that they did not believe the plaintiff was involved with the forgeries – and then broadcasts the spliced interviews to the public, does the reporter's conduct in fabricating the "interviews" and altering the meaning of the responses in this fashion provide sufficient evidence of actual malice to support a jury verdict in favor of the public figure?

4. Where a television reporter misquotes a candidate for public office and falsely broadcasts to the public that the candidate has accused his public figure opponent of involvement in a crime when the candidate in fact accused only the public figure's supporters of involvement in the crime, does the misquotation provide sufficient evidence of actual malice to support a jury verdict in favor of the public figure?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Harvey S. Peeler, Petitioner, and Spartan Radiocasting, Inc., and Allan Ray Tedder, Respondents.

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OPINION BELOW

The opinion of the South Carolina Supreme Court, (*Harvey S. Peeler v. Spartan Radiocasting, Inc. and Allan Ray Tedder*, No. 24531, November 18, 1996) is reported at __ S.C. __, 478 S.E.2d 282 (1996). A copy of the opinion appears in Appendix A. The January 13, 1997 order of the South Carolina Supreme Court denying the Petition for Rehearing appears in Appendix B.

JURISDICTION

The South Carolina Supreme Court entered and filed the judgment and opinion in this case on November 18, 1996. The Petitioner timely filed a Petition for Rehearing which was denied by Order filed January 13, 1997. This petition for Writ of Certiorari has been filed within 90 days of that date.

This Court has jurisdiction of the Petition for Writ of Certiorari under 28 *U.S.C.* § 1257(a) because Petitioner has timely filed a petition for writ of certiorari of a final judgment of a state supreme court in which the state court in a public figure plaintiff defamation case applied incorrect and unsettled principles of constitutional malice.

CONSTITUTIONAL PROVISION INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const. amend I.

STATEMENT OF THE CASE

This defamation by fabrication action arose out of two televised news reports concerning Petitioner Harvey S. Peeler, a candidate for re-election to the South Carolina Senate, and a controversy involving the forging of signatures on a petition drive to have one J.R. Stroupe placed on the ballot. These news reports were prepared by Respondent Allan Ray Tedder and were broadcast by his employer Spartan Radiocasting, Inc. In one news report, Tedder reported that J.R. Stroupe had accused Senator Peeler of being involved in the forgeries, although the evidence presented at trial showed that Stroupe never made the accusation and that Tedder knew this. In the other news report, Tedder edited on camera interviews he conducted with two citizens to make it appear that these citizens believed Senator Peeler had been involved in the forgeries, even though both citizens "testified that they specifically told Tedder they did not think Peeler was involved with the forgeries." (478 S.E.2d at 285, Waller, J., dissenting). On appeal from a jury verdict in favor of Senator Peeler, the South Carolina Supreme Court reversed on grounds that the record lacked clear and convincing evidence of actual malice. The court reversed the jury's verdict even though Respondents' own news director testified with respect to the reports that "it would seem to me we are dealing with fabrication." (R. 00255, lines 16-18).

Following incumbent state Senator Harvey Peeler's victory in the 1988 Democratic primary for a South Carolina Senate seat, J.R. Stroupe began a petition drive to have his name placed on the November ballot as a candidate opposing Senator Peeler. Stroupe and his supporters gathered petition signatures for this purpose and filed the petitions with the state Election Commission. After receipt of the petitions, the Election Commission received reports that the signatures of

some of the people whose names appeared on the petitions had been forged. The State Law Enforcement Division (SLED) began an investigation of the allegations.

On Monday, August 29, 1988 WPSA, a television station owned by Respondent Spartan Radiocasting, assigned television reporter Ray Tedder to cover the story. Tedder interviewed or talked with a number of people connected with the controversy. As Tedder acknowledged at trial, neither the state investigating agents, the voter registration people, the Election Commission, or anyone else gave him any indication that Senator Peeler himself was under suspicion of being involved with the forgeries.

Later that day Tedder conducted a telephone interview with Stroupe and proceeded to Stroupe's one room grocery store to talk with Stroupe and his supporters. Tedder talked with Stroupe friend and supporter Haynes Mullinax about the controversy. Tedder also talked with Stroupe. As Mullinax testified, Stroupe was visibly drunk at this time and in fact had been drunk for about three or four previous days. Stroupe looked "terrible," with "bloodshot eyes." Stroupe donned sunglasses and went outside the store where Tedder conducted an on camera interview with Stroupe.

At no time during the on camera interview did the intoxicated Stroupe accuse Senator Peeler of being involved with the forgeries. Haynes Mullinax, who was present at the grocery store when Tedder talked with Stroupe and also observed the on-camera interview filmed outside the store, expressly testified that Stroupe never told Tedder that Peeler had anything to do with the forgeries. Although Tedder testified at trial that Stroupe did tell him off-camera that Stroupe believed that "Senator Peeler or someone in his camp...somehow caused these forgeries to occur" (R. 00151), Senator Peeler impeached this testimony by introducing deposition testimony in which Tedder had stated that he

could not remember "for sure" whether Stroupe had accused Peeler of the forgeries and that he only remembered Stroupe accusing Peeler's supporters of this. (R. 00152, 00154).

Tedder returned to the station and prepared the newscast for broadcast. On Monday, August 29, 1988 WPSA broadcast the report prepared by Tedder. Referring to the problem with the forged petitions, Tedder told viewers that Stroupe had claimed that "Peeler or his supporters engineered this problem." Tedder, however, presented no video of Stroupe actually making this accusation. The transcript of the entire newscast is as follows:

> RAY TEDDER: These SLED agents are pouring over petitions that have been filed by JR Stroupe, a former Cherokee County Councilman who wants to run for state senate. The State Election Commission says twenty people have signed affidavits saying they didn't sign the petitions, that someone forged their signatures. These agents are trying to find out if there are more. At Stroupe's service station near Thickety Mountain supporters are claiming its just dirty politics.
>
> J.R. STROUPE: Everything was fine until I asked to see them.
>
> RAY TEDDER: Stroupe says he had hundreds of people working for him trying to get enough signatures to get him on the ballot in November opposite incumbent State Senator Harvey Peeler. He says he doesn't know who might have forged the signatures, but <u>he claims Peeler or his supporters engineered this problem</u>. Peeler says, that's nonsense.

HARVEY S. PEELER, JR.: The first time I heard about it, Ray, was yesterday afternoon. It took me totally by surprise.

RAY TEDDER: For election officials finding out who did it is not as important as finding out how many signatures are valid. They have to certify the petitions by September 1st. In Gaffney, Ray Tedder, TV-7 eyewitness news.

Tedder's declaration that Stroupe had accused Senator Peeler of the forgeries was a WPSA "exclusive." Four local newspapers were also covering the controversy that week. None of these newspapers reported that Stroupe had accused Senator Peeler of committing the forgeries – consistent with Haynes Mullinax's eyewitness testimony, they reported only that Stroupe had accused Peeler's supporters of involvement in the forgeries.

On Thursday, September 1, 1988, Tedder prepared a second newscast concerning the controversy. After learning from state officials that Stroupe had failed to qualify for the ballot, he interviewed Stroupe to obtain his reaction. He then went to a local supermarket and conducted an on camera interview of two shoppers, John Gimball and Arthur Hall, who had exited the store. According to Gimball, Tedder during this interview asked him only questions pertaining to politics in general. Specifically, Tedder asked Gimball whether he believed it was "possible in America that politicians may do some things that were not exactly right to win." (R. 00126). Tedder also asked Gimball whether he thought that "there is a lot of things that people would know but they not going to come forward or to this effect?" (R. 00126). Gimball responded "It wouldn't surprise me. I mean there's so much things that go on that people won't say nothing about it." Tedder did not ask Gimball whether he believed Senator Peeler had been involved in the forgeries.

And Gimball's final comment to Tedder was that Gimball did not believe that Peeler "would do anything like we were discussing in general with politics." (R. at 00128).

Tedder also interviewed shopper Arthur Hall. He asked Hall whether Hall believed that Senator Peeler had anything to do with SLED coming to Cherokee County to investigate. Hall responded "[m]y opinion is that Harvey has something to do with it." At no time during the interview, however, did Tedder ask Hall if believed Senator Peeler had anything to with the forgeries.

Tedder returned to the station and prepared the second newscast. On Thursday, September 1, 1988, Channel Seven broadcast Tedder's report. Appearing on camera, Tedder told viewers that state agents were continuing to investigate to determine who had committed the crime of forging the petitions; that Stroupe supporters believed that someone in the Peeler camp had set Stroupe up; and that Peeler had stated that he had nothing to do with it. After stating Senator Peeler's denial, Tedder commented "Peeler will be hard pressed to convince a lot of people. They believe its Cherokee County politics as usual." Immediately following these comments, the on-camera answers given by Gimball and Hall during their interviews were spliced into the footage so that it appeared that they were commenting on Tedder's statement that it would be "hard to convince people" that Peeler was not involved in the forgeries. The transcript of the entire newscast is as follows:

> RAY TEDDER: According to the South Carolina elections officials twenty people claim their names were forged on these petitions and that helped keep J.R. Stroupe twenty-seven away from having enough to get on the ballot opposite incumbent state senator, Harvey Peeler. These SLED agents

sorting the petitions are continuing to investigate hoping to find out who committed the crime. J. R. Stroupe is conducting his own investigation. Stroupe wants to prove he had nothing to do with the forgeries and the supporters who gathered at his service station believe someone in the Peeler camp set Stroupe up. Peeler says he has nothing to do with it. But Peeler will be hard pressed to convince a lot of people. They believe its Cherokee County Politics as usual.

John Gimball:

It wouldn't surprise me. I mean there's so much things that go on that people won't say nothing about it.

Arthur Hall:

My opinion is Harvey has got something to with it.

After the second broadcast, Senator Peeler became angry at WPSA because they had failed to give him an opportunity to respond to the accusations that he was involved in the forgeries. Senator Peeler complained to Channel 7 and he and his brothers went to a meeting at the station to discuss the situation. They met with Tedder and news director Harvey Cox and complained about not being given an opportunity to respond to Stroupe's accusation. Prior to the meeting, Cox attempted to locate the recording of the Thursday newscast – the "air check" – that was played on the air. Cox discovered, however, that the air check of the Thursday broadcast had "disappeared." Cox later learned that this air check tape had been bulk erased.

The absence of an air check for this particular broadcast was quite unusual. Cox testified that Channel Seven kept air checks of ninety-nine percent of its broadcasts for about one week after each week's broadcasts. Cox could remember only one prior occasion when an air check had been erased. Cox did not know who had erased the air check and testified that he did not mean to suggest that he thought that Tedder had done so. Cox did locate a tape which contained the news story that Tedder prepared. At the meeting with Senator Peeler and his brothers, Cox played this tape. Senator Peeler, however, insisted that the tape did not contain the entire story broadcast over the news. In particular, Senator Peeler told Cox that the actual broadcast had contained a still picture of himself and that an anchor lead-in to the story proclaimed "Peeler accused of forgery."

On August 6, 1990 Senator Peeler filed suit against Spartan Radiocasting, Inc. and Allan Ray Tedder in the Court of Common Pleas of Spartanburg County, South Carolina. In this suit, Senator Peeler alleged that the Respondents had published defamatory matter about him during two television newscasts and sought to recover compensatory and punitive damages. (R. 00018-00028). The Respondents filed an Answer and Amended Answer denying that they had published any actionable false or defamatory statements about the Respondent and alternatively contending that any defamatory matter published was not published with actual malice. (R. 00030, 00058).

The Respondents subsequently moved for summary judgment on grounds, inter alia, that the Petitioner had failed to present evidence sufficient to submit to the jury on the question of whether the defamatory newscasts had been published with actual malice. (R. 00047). Senator Peeler opposed this motion on grounds that the jury could find actual malice, from the evidence showing that Tedder had fabricated the false allegations. (R. 00110-00111). By Order

dated June 9, 1992 the trial court denied the motion on grounds that the evidence showing that Tedder had materially altered the meaning of the statements made by the interviewees raised questions of fact as to whether the publications had been made with actual malice. (R. 00002-00004).

At trial a number of people, including Gimball and Hall, testified that they understood this broadcast as containing declarations by Gimball and Hall that they believed that Senator Peeler was involved in the forgeries. Gimball testified that the broadcast was not an accurate reflection of what he told Tedder and that he did not think at the time he gave the interview that his response would imply that Peeler was involved in forgeries. The words which Tedder said on the video preceding Gimball's comment ("But Peeler will be hard pressed to convince a lot of people. They believe its Cherokee County Politics as usual") were never mentioned to Gimball during the interview. According to Gimball, his answer "[i]t wouldn't surprise me" was an answer to a question about general politics.

Hall also testified that the broadcast made it appear that he said something he did not say – viz., that he believed that Senator Peeler was involved in the forgeries. Hall described the broadcast as "a damn lie, I didn't say nothing about no forgery." (R. 00236). He felt that the broadcast hurt Senator Peeler's reputation. After hearing the testimony of the eyewitnesses who testified that they never said what Tedder reported, Harvey Cox, the news director at Tedder's station, testified that "[b]ased on what I have heard, it would seem to me we are dealing with fabrication." (R. 00255, lines 16-18).

The trial court denied the directed verdict motion filed by the Respondents on grounds, inter alia, that Senator Peeler had presented evidence from which the jury could find publication with actual malice. (R. 00386). At the close of

evidence, the trial court instructed the jury that the plaintiff had the burden to prove both falsity and actual malice by clear and convincing evidence. (R. 00427). With respect to the state of mind required to prove actual malice, the trial court instructed the jury, inter alia, that "[a] deliberate fabrication or alteration of a statement or publication may equate with knowledge of its falsity if the jury finds that the alteration materially changed the meaning conveyed by the statements." (R. 00466). The jury was given special verdict forms requiring the jury to make findings on each element of defamation. These special verdict forms also asked the jury to determine if falsity and actual malice had been proven by clear and convincing evidence.

The jury returned a verdict specifically finding as follows:

> THE COURT: Hand up the verdict, please, sir. All right, sir. To the question of whether or not the jury finds that the plaintiff has proven by a preponderance of the evidence that the broadcasts in question were defamatory, the answer of the jury is yes; to the question of whether or not the jury has unanimously found that the plaintiffs have proven by clear and convincing evidence that the broadcasts complained of by the plaintiff were false, the answer is yes; to the question of whether or not the jury has found unanimously that the plaintiff has proved by clear and convincing evidence that the broadcasts were published by the defendants with actual knowledge of the falsity thereof or with a reckless disregard for the truth or falsity thereof, the answer is yes....

(R. 00476).

The jury found in favor of Senator Peeler and against both Tedder and Spartan Radiocasting in the amount of $50,000 in compensatory damages. The jury also returned a verdict against Spartan Radiocasting, Inc. for $625,000 on the punitive damages claim.

On December 22, 1992 the trial court denied the Respondents' post-trial motions for judgment notwithstanding the verdict and for a new trial on the same grounds that it denied their directed verdict motion. (R. 00006). The trial court also conducted an independent review of the punitive damages award and concluded that it was properly supported by the evidence. On December 23, 1992 the trial court accordingly entered judgment on the jury verdict.

In an astounding decision, the South Carolina Supreme Court with one justice dissenting reversed the judgment on grounds Senator Peeler had failed to prove actual malice. In its opinion, the majority stated that it would conduct a de novo review of the record only to determine if there was clear and convincing evidence of malice and would not review the finding of falsity by this standard. Nonetheless, with respect to the first broadcast, the majority ruled that Senator Peeler had failed to provide clear and convincing evidence of falsity –"Peeler may have proven he did not commit the forgeries, but he failed to prove by clear and convincing evidence that Stroupe did not make the accusation." 478 S.E.2d at 284. Noting that other newspapers had printed quotes from Stroupe that Peeler's supporters had forged the signatures, the majority concluded that Peeler "may have practiced sloppy journalism by referring to Peeler rather than only his supporters" but "there is no evidence in the record that he did so with actual malice." Id. at 285.

With respect to the second broadcast, the majority ruled that Gimball and Hall's testimony –

> did not clearly show that Tedder deliberately misrepresented his interviews with them. Tedder's comment prior to airing these quotes may have been ambiguous, but without additional evidence, we hold that this does not amount to clear and convincing evidence of actual malice.

478 S.E.2d at 285. Dissenting, Justice Waller noted that Tedder's deposition and the testimony of Haynes Mullinax

> reveal that Stroupe accused only Peeler's supporters, and not Peeler himself, of involvement in the forgeries... [T]he fact that Tedder misquoted Stroupe as accusing Peeler himself of participation in the forgeries...provide clear and convincing evidence sufficient to submit the case to the jury.

478 S.E.2d at 285.

With respect to the second broadcast, Justice Waller agreed that "it is clear that Tedder edited portions of his interviews with Gimball and Hall, then spliced them in at appropriate junctures to convey the impression their statements implicated Peeler in the forgeries." 478 S.E.2d at 285. He concluded:

> As broadcast, the statements of both Gimball and Hall convey to the listener the impression they believed Peeler was involved in the forgeries. This, however, is not the information reported to Tedder. Moreover, the information which was given to Tedder is spliced and reported out of context. In my opinion, as a whole, the record reflects more than merely "sloppy journalism." In my

> opinion, the actions of appellants in misquoting Stroupe, and in splicing and editing the statements of Hall and Gimball, demonstrate a deliberate attempt to convey the false impression that people were questioning Peeler's involvement in the forgeries. In my opinion, this constitutes an "extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers," so as to provide clear and convincing evidence of malice.

478 S.E.2d at 286.

REASONS FOR GRANTING THE WRIT

I.

THE MAJORITY'S DECISION WITH RESPECT TO THE AUGUST 29 BROADCAST IS CONTRARY TO THE DECISIONS OF THIS COURT BECAUSE THE MAJORITY MADE A DE NOVO REVIEW OF FALSITY, APPLIED A CLEAR AND CONVINCING EVIDENCE STANDARD TO THE ISSUE OF FALSITY, AND MADE A FORBIDDEN CREDIBILITY DETERMINATION IN CONCLUDING THAT NEITHER FALSITY NOR MALICE HAD BEEN PROVEN BY CLEAR AND CONVINCING EVIDENCE

In *Bose Corp. v. Consumers Union,* 466 U.S. 485 (1984) the Court held that, in cases governed by the actual malice standard fashioned in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), appellate courts are required to exercise independent judgment to "determine whether the record establishes actual malice with convincing clarity." Although

the Court provided some guidance as to the scope of this review in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), the Court has never clearly set forth the guidelines which govern this de novo review. In particular, the Court has never determined the extent to which a reviewing court in conducting a de novo malice review may disregard actual or presumed jury findings on related issues such as falsity, even though the findings would be unreviewable under the clearly erroneous or comparable state law standard.

The *Peeler* majority's decision with respect to the August 29 broadcast demonstrates the perils created by this indefinite standard. Although the jury specifically found by clear and convincing evidence that Stroupe never made the accusation reported by Tedder, the *Peeler* majority – purporting to conduct a de novo review only of actual malice – actually conducted a de novo review of whether Senator Peeler had proven that Tedder's report was false by clear and convincing evidence. The majority accordingly ruled that Senator Peeler "failed to prove by clear and convincing evidence that Stroupe did not make the accusation." This ruling required the majority to make a de novo review that went beyond any review ever sanctioned by this Court. First, this Court has never held that reviewing courts have free rein to conduct an independent review of whether the plaintiff proved falsity. In *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991) the Court recognized that a de novo review of malice does require some consideration of the issue of falsity. But the Court indicated that a reviewing court in an altered quotation case must consider falsity only to the extent of determining whether the requisite falsity inheres in the attribution of words to the speaker which he did not speak. In this case, the falsity at issue clearly was the attribution by Tedder of words to Stroupe which the jury found that Stroupe did not speak. The *Peeler* majority went

far beyond this limited inquiry and made its own ruling that the publication had not been proven false.

The Petitioner asserts that the *Peeler* majority could disturb the jury's falsity finding only if there was no evidence which reasonably supported the jury's findings, the South Carolina counterpart to the federal clearly erroneous standard of review. *Townes Associates Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773, 775 (1976). And because the evidence in fact overwhelmingly supported the jury's finding on this point, the *Peeler* majority was bound by this finding. Although the Court has never expressly ruled that a reviewing court may not disturb falsity findings supported by substantial evidence, the Petitioner believes that this is the rule indicated by the decisions in *Bose*, *Masson*, and *Harte-Hanks Communications*. This rule also best balances the tension between the deference normally afforded the jury and a reviewing court's duty to "independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of actual malice." *Bose*, supra, 466 U.S. at 511.

Second, the *Peeler* majority compounded the problem created by its review of the falsity issue by applying the wrong standard of proof to the falsity determination. Although the jury in this case was instructed to find and did find that falsity had been proven by clear and convincing evidence, the Court has never required falsity to be proven by clear and convincing evidence. See *Harte-Hanks Communications, Inc. v. Connaughton*, supra (affirming a jury verdict where the jury was instructed to find falsity by the preponderance of the evidence but declining to pass on whether this is the correct standard). The Petitioner believes that the preponderance standard governs the falsity determination and a reviewing court should not be able to

reverse a jury verdict because the court finds clear and convincing evidence of falsity lacking.

Third, in order to disturb the jury's specific finding that Stroupe never made the accusation, the *Peeler* majority improperly made a crucial credibility determination. It must be remembered that eyewitness Haynes Mullinax expressly testified that Stroupe never made the accusation; that Tedder admitted no one else told him Peeler was suspected in involvement in the forgeries; and that none of the four newspapers covering the controversy reported that Stroupe had accused Peeler. The only evidence that Stroupe did make the accusation was Tedder's trial testimony that Stroupe purportedly told him off-camera that Peeler or his supporters committed the forgeries. But Senator Peeler impeached this self-serving testimony by showing that Tedder in his deposition had told a different story:

> Q. In any event, under oath two years ago you didn't indicate that Mr. Stroupe had accused Senator Peeler directly, did you?
>
> A. That's correct, but I also have indicated that I didn't have a recollection of every detail.

(R. 00155). Faced with his conflicting deposition testimony, Tedder attempted to explain this discrepancy on grounds that he had been unable to recall whether Stroupe made the accusation at the deposition but that he somehow had "remembered" the accusation given time to think about it.

The members of the jury – who observed Tedder's demeanor as he attempted to explain the direct contradiction between his trial and deposition testimony – found this explanation uncredible and effectively found by clear and convincing evidence that Tedder's assertion that Stroupe had accused Peeler was false. But the *Peeler* majority – by

stating that Peeler never proved Stroupe did not make the accusation – could only have reached this conclusion by accepting Tedder's trial testimony as credible and rejecting the jury's determination that he was not credible.

All prior decisions of this Court indicate that a reviewing court may not reject a jury's credibility determination unless clearly erroneous. In *Bose*, supra, 466 U.S. at 499, 500 and *Harte Hanks* the Court stated that credibility determinations are reviewed under the clearly erroneous standard. See also *Harte-Hanks Communications, Inc. v. Connaughton*, supra, 491 U.S. at 694 (White, J., concurring) ("[i]n my view, in cases like this the historical facts – e.g., who did what to whom and when – are reviewable only under the clearly erroneous standard mandated by Rule 52. Credibility determinations fall in this category"); *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 714 (4th Cir.), cert. denied, 501 U.S. 1212 (1991)("[w]e are mindful...that this standard of review does not transfer an appellate court into a super-jury, nor does it give us free reign to revisit credibility determinations or to redetermine findings of historical fact"); *Newton v. National Broadcasting Co.*, 930 F.2d 662, 670-671 (9th Cir. 1990), cert. denied, 502 U.S. 866 (1991)("[t]he presumption of correctness carries its maximum force when we review findings of fact that turn on credibility determinations because of the factfinder's 'unique opportunity to observe the demeanor of the witnesses...' In sum, we read *Bose* and *Harte-Hanks* as creating a credibility exception to the *New York Times* rule of independent review"). Because the jury's rejection of Tedder's self-serving explanation was certainly not clearly erroneous given the other evidence presented, the *Peeler* majority was bound by this finding.

Finally, after engaging in the foregoing unrestrained review of the issue of falsity, the *Peeler* majority improperly used its finding that falsity had not been proved as the basis

for concluding that there was no clear and convincing evidence of actual malice. If the *Peeler* majority had accepted the jury's finding on falsity as it was required to do, then – as discussed in more detail infra – the *Peeler* majority could have only concluded under *Masson* that Tedder made the false statement with actual malice. By attributing words to Stroupe that Stroupe never said, Tedder materially altered the meaning of Stroupe's words and, therefore, this defamatory publication was made with actual malice. Although the *Peeler* majority alternatively suggested that Tedder may have been guilty simply of sloppy journalism – i.e., suggesting that he simply made a mistake as to the scope of the accusation made by Stroupe – there was no evidence to support this notion because Tedder never testified that he made a mistake and in fact insisted that Stroupe did make the accusation.

As the foregoing discussion demonstrates, the *Peeler* majority used the constitutionally mandated de novo review of malice to reach and destroy jury findings that do not implicate First Amendment values. This goes too far and the Court should grant this petition to correct these constitutional errors and to provide more precise guidelines as how the de novo review should be conducted.

II.

THE MAJORITY'S DECISION IS CONTRARY TO THIS COURT'S DECISION IN *MASSON V. NEW YORKER MAGAZINE* AND EFFECTIVELY IMPOSES A GREATER BURDEN ON PUBLIC FIGURE PLAINTIFFS THAN ANY PRIOR UNITED STATES SUPREME COURT DECISION

In *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991) the Court considered the circumstances in which a reporter's attribution of words to a public figure which the public figure did not speak provided evidence sufficient to

reach the jury on the question of actual malice. The Court rejected the notion that any alteration of a verbatim quotation constituted the knowledge of falsity required to prove actual malice. The Court explained that minor changes to correct grammar and syntax did not show malice and that even a deliberate alteration of words did not necessarily show malice. The Court concluded, however, that

> a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of ...[New York Times...and Gertz] unless the alteration results in a material change in the meaning conveyed by the statement. The use of quotations to attribute words not in fact spoken bears in a most important way to that inquiry, but it is not dispositive in every case.

501 U.S. at 517. Stating the *Masson* standard conversely, a deliberate alteration of the words uttered by a speaker which results in a material change in meaning does equate with knowledge of falsity.

With respect to the first broadcast, Senator Peeler presented clear and convincing evidence that Stroupe never accused him of involvement in the forgeries, that Stroupe only accused Peeler's supporters of involvement in the forgeries, that Tedder nonetheless reported that Stroupe did accuse Peeler, and that Tedder's attribution of words to Stroupe which he did not say materially altered the meaning of what he did say. With respect to the second broadcast, Senator Peeler presented undisputed evidence that Tedder deliberately altered the intended meaning of the words spoken by Gimball and Hall by omitting from the newscast the questions he actually asked them and instead by inserting their answers following his comment that Peeler would be hard pressed to convince people that he was not involved in

the forgeries. In other words, Tedder in effect changed the questions to which they were responding so that it appeared that they were answering a different question – viz., whether Senator Peeler was involved in the forgeries. The evidence was also undisputed that the splicing caused a material change in the meaning of the answers intended by Hall and Gimball. Hall and Gimball and other witnesses all testified that they understood the broadcast to imply that Hall and Gimball believed Senator Peeler was involved with forgeries. This change rendered their answers – which in the context reported to Tedder had no defamatory implication – defamatory as to Senator Peeler in the context broadcasted to the public. As Respondents' own news director admitted, Tedder fabricated this defamatory meaning by his tape splicing.

The trial court expressly instructed the jury that "[a] deliberate fabrication or alteration of a statement or publication may equate with knowledge of its falsity if the jury finds that the alteration materially changed the meaning conveyed by the statements." (R. 00466). The jury returned a verdict for Senator Peeler finding with respect to both broadcasts that malice and falsity had been proven by clear and convincing evidence. In light of the instruction given, the jury necessarily found that Tedder deliberately fabricated or altered first Stroupe's and then Gimball's and Hall's statements so as to materially change their meaning and, therefore, that Tedder had knowledge of the falsity. And knowledge of falsity is actual malice.

Assuming arguendo, however, that Tedder somehow lacked actual knowledge that neither Stroupe, Gimball, nor Hall had implicated Senator Peeler in the forgeries, the record is replete with evidence that Tedder acted with "reckless disregard" in publishing the statements. Reckless disregard is shown where "the defendant must have made the false publication with a 'high degree of awareness of...probable falsity...,'or must have 'entertained serious doubts as to the

truth of his publication...'" *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 667 (1989). Because it is undisputed that Tedder conducted the interviews of Stroupe, Gimball, and Hall and prepared the reports broadcasts to the public, he certainly must have had a high degree of awareness that his reports – which contained statements that the interviewees never made – were untrue. See *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) ("[p]rofessions of good faith will be unlikely to be persuasive...where a story is fabricated by the defendant...[or] is the product of his imagination").

Although the jury, the trial judge, and Justice Waller all followed the *Masson* opinion to the letter and agreed that the Respondents had acted with malice under this standard, the South Carolina Supreme Court majority disagreed. Without applying the *Masson* standard, the majority refused to accept the jury's finding that Tedder had fabricated the Stroupe accusation and stated that Gimball and Hall's testimony did not show that Tedder deliberately misrepresented his interviews with them.

Finally, the *Peeler* majority ignored additional circumstantial evidence of malice which supported the jury's finding. First, the Court has recognized that actual malice may be shown by evidence establishing that a news story has been fabricated or is a product of the reporter's imagination. *St. Amant v. Thompson*, supra, 390 U.S. 732; see also *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1512 (D.C. Cir. 1996)("[t]he Supreme Court in *St. Amant* identified three types of circumstantial evidence that would likely support a finding of actual malice: They are evidence establishing that the story was ...'fabricated'"). In fabrication cases, of course, the fabricator normally has actual knowledge that the publication is false. The *Peeler* majority simply ignored the evidence – including news director Harvey Cox's explicit acknowledgement that fabrication had occurred –

showing that Tedder fabricated the false publications and that the very act of fabrication provided an inference of malice. Second, in *Harte-Hanks Communications, Inc. v. Connaughton*, supra, the Court recognized that evidence of a motive for publishing defamatory matter is circumstantial evidence of actual malice. Here Senator Peeler presented evidence and argued to the jury that Tedder was motivated to fabricate the stories to scoop the competition. It is obviously a major news story when a candidate accuses his opponent of a crime. Third, the missing air check – which would have shown an anchor lead-in proclaiming "Peeler accused of forgery" – provided further circumstantial evidence of actual malice as the jury could have inferred that Tedder erased the tape in an effort to destroy evidence of the defamatory broadcast.

In refusing to follow *Masson* in a case where the jury found a reporter fabricated a defamatory news story, the South Carolina Supreme Court has imposed an impossibly high standard on public figure plaintiffs seeking to remedy "made up" stories broadcast by television reporters. If the evidence presented by Senator Peeler did not establish malice, the Petitioner submits that no evidence short of an explicit admission by the reporter that he knew the story was false can survive the South Carolina Supreme Court's de novo review of actual malice. This imposes a greater burden in proving malice on public figures in South Carolina than any prior decision of the Supreme Court has imposed.

A case of fabrication by a television reporter is unlike any other kind of defamation case insofar as the issue of actual malice is concerned. It does not implicate the concern of *New York Times Co. v. Sullivan* and its progeny that the media should be able to publish what "someone else said" without liability, unless the media knows the statement is false or acts with reckless disregard as to the truth or falsity of the statement. If the reporter makes up a defamatory

statement and then broadcasts it, he has to know that it is untrue or at least that he has no basis for knowning whether the made up statement is true.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Clarence S. Norris
Counsel of Record
Counsel for Petitioner

APPENDIX

APPENDIX A

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Harvey S. Peeler, Respondent,

v.

Spartan Radiocasting, Inc.,
and Allan Ray Tedder, Appellants.

Appeal from Spartanburg County
J. Derham Cole, Judge

Opinion No. 24531
Heard April 16, 1996 – Filed November 18, 1996

REVERSED

William U. Gunn and Perry D. Boulier, both of Holcombe, Bomar, Cothran, & Gunn, P.A., of Spartanburg; Bruce W. Sanford, Henry S. Hoberman, and Stephanie S. Abrutyn, all of Baker & Hostetler, of Washington, D.C., for appellants.

Robert G. McCulloch, Jr., and J. Edward Bell, III, both of Bell & Bagley, of Sumter, for respondent.
Jay Bender, of Baker, Barwick, Ravenel & Bender, of Columbia, for amicus curiae, South Carolina Press Association.

PER CURIAM: This is an appeal of a defamation case. The jury awarded respondent Harvey S. Peeler $50,000.00 actual damages and $625,000.00 punitive damages. We reverse.

PEELER, v. SPARTAN RADIOCASTING, INC., et al.

FACTS

On August 29 and September 1, 1988, appellants broadcast two television news stories on channel WSPA[1] about forgeries of names on a petition to place J.R. Stroupe's name on the ballot for election to the South Carolina Senate. The incumbent, Peeler, brought this libel action alleging these news stories conveyed that Peeler had a role in the forgeries and the public believed he was guilty of forgery.[2] The following is a transcript of the August 29th broadcast:

> Ray Tedder: These SLED agents are pouring over petitions that have been filed by J.R. Stroupe, a former Cherokee County Councilman who wants to run for the State Senate. The State Election Commission says that twenty people have signed affidavits saying that they didn't sign the petitions; that someone forged their signatures. These agents are trying to find out if there are more. At Stroupe's Service Station near Thickety Mountain, supporters are claiming it's just dirty politics.
>
> J.R. Stroupe: Everything was fine until I asked to see them.
>
> Tedder: Stroupe says he has hundreds of people working for him trying to get enough signatures to get him on the ballot in November, opposite incumbent State Senator

---

[1] WSPA is owned by appellant Spartan Broadcasting, Inc. (Spartan)

[2] Stroupe eventually pled guilty to forgery.

> Harvey Peeler. He says he doesn't know who might have forged the signatures, but he claims Peeler or his supporters engineered this problem. Peeler says that's nonsense.
>
> Harvey Peeler: The first I heard about it, Ray, was yesterday afternoon. It took me totally by surprise.
>
> Tedder: For election officials, finding out who did it is not as important as finding out how many signatures are valid. They have to certify the petition by September the first. In Gaffney, Ray Tedder, TV-7, Eyewitness News.

The following is a transcript of the September 1st broadcast:

> Tedder: According to South Carolina Election Officials, twenty people claim their names were forged on these petitions. That helped keep J.R. Stroupe twenty-seven away from having enough to get on the ballot opposite incumbent State Senator Harvey Peeler. These SLED agents sorting the petitions are continuing to investigate hoping to find out who committed the crime. J.R. Stroupe is conducting his own investigation. Stroupe wants to prove he had nothing to do with the forgeries, and the supporters who gathered at his service station believe someone in the Peeler camp set Stroupe up. Peeler says he had nothing to do with it. But Peeler will be hard pressed to convince a lot of people.

> They believe it's just Cherokee County politics as usual.
>
> John Gimball: It wouldn't surprise me. I mean, there's so much things that go on that people won't say nothing about.
>
> Arthur Hall: My opinion is that Harvey's got something to do with it.
>
> Tedder: Stroupe says he's not decided whether to wage a write-in campaign, but his supporters say they will carry on one with or without his active participation. In Cherokee County, Ray Tedder, TV-7, Eyewitness News.

Peeler alleges Tedder misquoted Stroupe in the August 29th story by stating Stroupe had accused Peeler of forgery. In the second story, Peeler alleges Tedder misquoted Gimball and Hall.

The jury returned a verdict of $50,000 actual damages against both appellants and $625,000 punitive damages against Spartan. The trial judge denied appellant's motions for a new trial nisi new trial absolute, and judgment notwithstanding the verdict (JNOV).

DISCUSSION

To recover damages for defamation, a public figure must prove by clear and convincing evidence that the statements were made with actual malice, that is, with knowledge that it was false or with reckless disregard as to its truth or falsity. *Harte-Hanks Communications, Inc. v. Connaughton,* 491

U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984); *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).[3]

Appellants contend we are to conduct an independent de novo review of the entire record to determine if there is clear and convincing evidence to support findings of actual malice and falsity.[4] We agree our scope of review on the issue of actual malice is a de novo review to determine if there is clear and convincing evidence. However, we do not agree this is the proper scope of review on the issue of falsity.

In *Bose*, the United States Supreme Court held there must be an independent review by the appellate court to determine if the evidence in the record supports a finding of actual malice by clear and convincing evidence. In *Harte-Hanks*, supra, the Supreme Court declined to address whether this mandatory review of actual malice should also be applied to the issue of falsity. Cf. *Locricchio v. Evening News Ass'n*, 438 Mich. 84, 476 N.W.2d 112 (1991)(in private figure plaintiff case independent review of falsity is required as logical corollary of independent review of actual

---

[3] Peeler conceded below that he is a public official and therefore must prove actual malice by clear and convincing evidence under *New York Times v. Sullivan*.

[4] "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." *Middleton v. Johnson*, 221 Va. 797, 273 S.E.2d 800, 802. *Accord Clark v. Cotton*, 207 Ga. App. 883, 429 S.E.2d 291 (1993).

malice required in public figure case). Accordingly, we are required to conduct an independent de novo review of the record only on the issue of actual malice.[5]

Actual malice is a subjective standard testing the publisher's good faith belief in the truth of his or her statements. The publisher must have entertained serious doubts as to the truth of his publication. *St. Amant v. Thompson,* 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). To establish recklessness, there must be an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. *Curtis Pub. Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). "Mere negligence does not suffice." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 111 S.Ct. 2419, 2429, 115 L.Ed.2d 447 (1991).

As to the August 29th newscast, Peeler may have proven he did not commit the forgeries, but he failed to prove by clear and convincing evidence that Stroupe did not make the accusation. Peeler presented Haynes Mullinax who testified he was present when Tedder spoke with Stroupe for the interview and Stroupe accused Peeler's supporters but not Peeler. Peeler also offered as evidence of actual malice that no other newspaper or television station had reported that Stroupe had accused Peeler when this story was aired. However, several newspapers did print quotes from Stroupe stating Peeler's supporters had forged the signatures. "A subjective awareness of probable falsity cannot be

---

[5] At oral argument, appellants in essence stated if we declined to adopt a de novo review on the evidence of falsity, the focus of this appeal should be on whether there is clear and convincing evidence of actual malice.

demonstrated under the standard of 'convincing clarity' by evidence showing that the publisher and the plaintiff disagreed with respect to their perceptions of events which they both observed." *McMurray v. Howard Publications, Inc.*, 612 P.2d 14 (Wyo. 1980). At best, Tedder may have practiced sloppy journalism by referring to Peeler rather than only his supporters, however, there is no evidence in the record that he did so with actual malice.

As to the September 1st newscast, Peeler presented the testimony of Gimball and Hall, the two men interviewed by Tedder. The testimony of these two men does not clearly show that Tedder deliberately misrepresented his interviews with them. Tedder's comment prior to airing these quotes may have been ambiguous, but without additional evidence, we hold this does not amount to clear and convincing evidence of actual malice.

Peeler also offered as evidence of actual malice the erasure of the tape containing the newscasts. This is not evidence of actual malice since there was no evidence the erasure was anything other than a routine practice. *Strange v. Cox Enterprises, Inc.*, 211 Ga. App. 731, 440 S.E.2d 503 (1994)(destruction of notes is not evidence of actual malice).

Pursuant to a de novo review of the record, we hold there is not clear and convincing evidence to support a finding of actual malice. We need not address appellants' remaining issue.

REVERSED.

/s/ Ernest A. Finney, Jr. C.J
/s/ James E. Moore A.J.
/s/ George T. Gregory, Jr. A.A.J.
/s/ Thomas C. Huff A.A.J.

Waller, A.J., dissenting in separate opinion.

PEELER, v. SPARTAN RADIOCASTING, INC., et al.

WALLER, A.J.: (Dissenting). I respectfully dissent. In my opinion, a de novo review of the record demonstrates clear and convincing evidence of malice.

In the August 29th broadcast, Tedder stated, with respect to the forged signatures, that Stroupe "Claims Peeler or his supporters engineered this problem." However, both Tedder's deposition, and the testimony of Haynes Mullinax, who was present when Stroupe made the statement, reveal that Stroupe accused only Peeler's supporters, and not Peeler himself, of involvement in the forgeries. In my opinion, the fact that Tedder misquoted Stroupe as accusing Peeler himself of participation in the forgeries is evidence of actual malice which, when coupled with the misrepresentations of the September 1st broadcast, provide clear and convincing evidence sufficient to submit the case to the jury.

In regard to the September 1st broadcast, it is clear that Tedder edited portions of his interviews with Gimball and Hall, then spliced them in at appropriate junctures to convey the impression their statements implicated Peeler in the forgeries. For example, Tedder says;

> Stroupe wants to prove he had nothing to do with the forgeries, and the supporters who gathered at his service station believe someone in the Peeler camp set Stroupe up. Peeler says he had nothing to do with it. But Peeler will be hard pressed to convince a lot of people. They believe it's just Cherokee County politics as usual.

In response to these statements, Gimball and Hall are immediately quoted, stating:

> Gimball: It wouldn't surprise me. I mean there's so much things that go on that people won't say nothing about.
>
> Hall: My opinion is that Harvey's [Peeler] got something to do with it.

As reported and spliced into the broadcast, these statements clearly imply that Hall and Gimball believed Peeler had something to do with the forgeries. However, both Gimball and Hall testified that they specifically told Tedder they did not think Peeler was involved with the forgeries. Gimball testified that his statement was, in reality, a response to an inquiry about general politics and whether or not some politicians may do things which are not right to win an election. It was not, he testified, a statement concerning Peeler or his alleged involvement with the forgeries. Similarly, Hall testified that his statement was made in response to a question as to whether or not Peeler was involved in the investigation of the forgeries; it was not intended to imply that he believed Peeler had anything to do with the forgeries.

As broadcast, the statements of both Gimball and Hall convey to the listener the impression they believed Peeler was involved in the forgeries. This, however, is not the information reported to Tedder. Moreover, the information which was given to Tedder is spliced and reported out of context. In my opinion, as a whole, the record reflects more

than mere "sloppy journalism." In my opinion, the actions of appellants in misquoting Stroupe, and in splicing and editing the statements of Hall and Gimball, demonstrate a deliberate attempt to convey the false impression that people were questioning Peeler's involvement in the forgeries. In my opinion, this constitutes an "extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers," so as to provide clear and convincing evidence of malice. I would affirm the trial court's denial of the motion for JNOV.[1]

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[1] Further, I would affirm the punitive damage award. In my opinion, the verdict is neither inconsistent nor violative of Spartan's due process rights.

APPENDIX B

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
(803) 734-1080

January 13, 1997

J. Edward Bell, III, Esquire
Eugene C. Fulton, Jr. Esquire
Bell & Moore
P.O. Box 460
Sumter, SC 29150

RE: Harvey S. Peeler v. Spartan Radiocasting, Inc. 90-CP-42-1890

Dear Counsel:

The Court has refused your Petition for Rehearing in the above case in the followig Order:

"Petition for rehearing is denied.

/s/ Ernest A. Finney, Jr. C.J

/s/ James E. Moore A.J.

/s/ George T. Gregory, Jr. A.A.J.

/s/ Thomas C. Huff A.A.J.

I would grant rehearing.

/s/ John H. Waller, Jr. A.J

January 13, 1997."

The remittitur in this matter is today being forwarded to the Clerk of Court for Spartanburg County.

Very truly yours,

CLERK

CND, Jr./djp

cc: Bruce W. Sanford, Esquire
Henry S. Hoberman, Esquire
Stephanie S. Abruthin, Esquire
William U. Gunn, Esquire
Perry D. Boulier, Esquire
Jay Bender, Esquire

APPENDIX C

STATE OF SOUTH CAROLINA)		
	)	IN THE COURT OF
COUNTY OF SPARTANBURG)		COMMON PLEAS
Harvey S. Peeler,	)	
Plaintiff,	)	
	)	
vs.	)	
	)	ORDER
Spartan Radiocasting, Inc.,	)	
and Alan Ray Tedder,	)	90-CP-42-1890
	)	
Defendent	)	

Defendants have filed a Motion for Summary Judgment in this case. A hearing on the motion was held before me on June 5, 1992. After reviewing the arguments by counsel as well as the memoranda, affidavits and case law submitted and considering them in a light most favorable to the Plaintiff I hereby deny the Motion for Summary Judgment.

This is an action for Defamation in which Plaintiff contends that two (2) broadcasts aired by the Defendants on August 28, 1988 and September 1, 1988 contained statements that were false and defamatory. Defendants primarily focused on two (2) grounds in their argument for Summary Judgment.

First, Defendants assert Plaintiff has shown no falsity of the statements contained in the two (2) broadcasts in question. Defendants rationale in essence is that Ray Tedder made remarks to the effect that there was a belief among certain individuals in Gaffney, SC that Mr. Peeler had something to do with the forged signatures on petitions. Defendants assert that these statements are true, because what they state is that there is "a belief" among Gaffney

residents that Mr. Peeler was involved with the forgeries of signatures on the petitions. At issue, the Defendants contend, is not whether it is true that Mr. Peeler was involved but rather whether there actually was a "belief" among certain Gaffney residents that Mr. Peeler was involved. The truth of this belief, Defendants contend, is evidenced by numerous newspaper articles discussing such beliefs and which were printed before the broadcasts were aired. Secondly, Defendants contend Plaintiff has not shown any evidence of actual malice which is required under *New York Times Co. v. Sullivan*, 376 U.S. 254 (19) since Mr. Peeler is a State Senator and thus, a public official.

Plaintiff argues that Defendants' first ground is incorrect and not applicable under the facts of this case and the ruling of *Masson v. New Yorker Magazine, Inc.*, 117 L.E. 2d 447 (1991). Plaintiff agrees that there is a principle in such cases known as the "rational Interpretation." Such principle would protect a reporter and broadcaster from a defamation suit if the reporter's publication of other individual's notations were substantially representative of the actual quotations. However, Plaintiff contends the protection just mentioned does not extend to situations where the reporter materially alters or amends the quotations of others. Plaintiff produced affidavits of two (2) individuals whose quotes were used by Defendant Tedder in the second broadcast. Plaintiff admits the quotes were substantially accurate representations of the individual's comments, but alleges the quotes were to questions other than the one used in the broadcast. More specifically, Plaintiff asserts when actually interviewed the individuals were asked if they believed Mr. Peeler had anything to do with calling for the SLED investigation. One individual replied "It wouldn't surprise me. I mean, there's so much things that go on that people won't say nothing about." The second individual responded "My opinion's that Harvey's got something to do with it." However, when these quotes were aired they were used as answers to a

question of whether Mr. Peeler was guilty of or connected to the crimes of forgery involved in the signatures on the petition. Plaintiff claims that using the quotations of individuals to a specific question as the answer or response to another question is a material alteration and results in a falsification. Moreover, Plaintiff asserts that this allegedly deliberate and material alteration changes the meaning of the quotation thereby creating a deliberate falsification and thus proves actual malice. In support of this contention Plaintiff relies upon the following language from *Masson*, supra:

> We conclude that a deliberate alteration of the words uttered by a Plaintiff does not equate with knowledge of falsity for purposes of *New York Times Co. v. Sullivan*,... unless the alteration results in a material change in the meaning conveyed by the statement. The use of quotations to attribute words not in fact spoken bears in a most important way on that inquiry, but it is not dispositive in every case.
>
> Deliberate or reckless falsification that comprises actual malice turns upon words and punctuation only because words and punctuation express meaning. Meaning is the life of language. And, for the reasons we have given, quotations may be a devastating instrument for conveying false meaning.

Id. at 473.

Plaintiff's argument essentially is that the meaning conveyed by the quotations is materially altered when they are used as answers to questions other than the original question to which they were given.

I believe Plaintiff has presented facts and arguments which present question of material fact, and therefore, Summary Judgment is DENIED.

IT IS SO ORDERED.

June 9, 1992

JAMES B. STEPHEN, JUDGE
SEVENTH JUDICIAL CIRCUIT

APPENDIX D

STATE OF SOUTH CAROLINA)		
	)	IN THE COURT OF
COUNTY OF SPARTANBURG)		COMMON PLEAS
Harvey S. Peeler,	)	
Plaintiff,	)	
	)	
vs.	)	
	)	ORDER
Spartan Radiocasting, Inc.,	)	
and Alan Ray Tedder,	)	90-CP-42-1890
	)	
Defendent	)	

This matter comes before the court on post-trial motions of the defendants wherein the defendants move for a new trial, a new trial absolute pursuant to Rule 59(a) of the South Carolina Rules of Civil Procedure, a new trial nisi, and a post-trial review of the punitive damage award.

This suit started as a result of the defendants broadcasting two television articles on August 29th and September1, 1988. The plaintiff claimed that he was libeled when the broadcast indicated to the public that he had committed the crime of forgery in connection with certain petitions filed by another candidate who was attempting to get on the General Election Ballot of November, 1988, in order to oppose the Plaintiff. This action was tried by the court and a jury commencing on June 15, 1992. Opening statements and testimony lasted three days. On June 19, 1992, final arguments were made and the case was submitted to the jury by way of a special interrogatory verdict form. The jury returned a verdict awarding the plaintiff $50,000.00 actual damages as to both defendants and $625,000.00 punitive damages against Spartan Radiocasting, Inc.

After the jury verdict was returned, the defendants moved for judgment notwithstanding verdict on the same grounds raised at the directed verdict stage. Additionally and in the alternative, the defendants moved for a new trial or for a new trial nisi on the grounds that the jury verdict was contrary to the fair preponderance of the evidence and that the jury verdict was so grossly excessive in that it was the result of arbitrariness, capriciousness, passion, prejudice or other consideration not found in the evidence.

This court has considered the defendants' motion for judgment notwithstanding the verdict on the same grounds raised by the defendants at the directed verdict stage. This court finds that the defendants' motion for judgment notwithstanding the verdict should be denied.

The defendants further move this court for a new trial or in the alternative a new trial nisi. This court finds that "under the thirteenth juror doctrine" that the evidence in this case justifies the verdict which was rendered. This court finds that there is sufficient evidence from which a jury could have found by clear and convincing proof that the defendants were aware of the probable falsity of the publications and that they entertained serious doubts as to the truth of those publications. There also exists sufficient evidence from which a jury could have found damages suffered by plaintiff as a result of the defamatory publications.

The defendants further move for a new trial nisi and asks this court to throw out the reject the verdict as being excessive. The defendants urge this court to find that the verdict is grossly excessive and due to passion and prejudice rather than reason.

This court finds after a complete review of the evidence that the verdict is not excessive. This court is not shocked by the amount of the verdict and finds it to be fair and reasonable

and supported by the evidence. This court finds that the verdict was not unduly liberal and further finds that the defendants' motion for a new trial nisi should be denied.

The defendants further move for a new trial upon the ground that the jury returned an inconsistent and illogical verdict. In this regard, the defendants contend that the jury verdict is inconsistent and illogical because the jury verdict is inconsistent and illogical because the jury assessed punitive damages against the defendant Spartan Radiocasting, Inc. but did not assess punitive damages against the defendant Allan Ray Tedder.

Under South Carolina law, a new trial may be ordered on grounds of inconsistent jury verdicts only where the verdicts are irreconcilably inconsistent. Indeed, the South Carolina Supreme Court has emphasized that "[i]t is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found." *Rhodes v. Winn-Dixie* 249 S.C. 526, 155 S.E.2d 308, 310 (1967). Accord *Haskins v. Fairfield Electric Co-op.*, 283 S.C. 229, 321 S.E.2d 185, 190 (Ct. App. 1984). With respect to punitive damages, the South Carolina Supreme Court has repeatedly stated that the decision of whether to award punitive damages and their amount are "particularly within the judgment and discretion of the jury, subject to supervisory power of the trial judge over jury verdicts." *Hicks v. Herring,* 246 S.C. 429, 144 S.E.2d 151, 154 (1965); Accord *Gamble v. Stevenson,* _____ S.C. _____, 406 S.E.2d 350 (1991). Thus the Defendants face a heavy burden in obtaining a new trial on grounds of the purportedly inconsistent verdicts on the punitive damages claim. If a logical reason for sustaining the verdicts can be identified, the verdicts must be upheld as a proper exercise of jury discretion.

The verdicts returned by the jury in the instant case can be reconciled. At the close of evidence, the Court properly

instructed the jury that it could consider the various factors set forth in *Gamble v. Stevenson*, supra, in deciding whether to award punitive damages. In *Gamble* the court stated:

> to ensure that a punitive damage award is proper, the trial court shall conduct a post trial review and may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's aware new or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and, finally (8) as noted in *Haslip*[1], "other factors" deemed appropriate.

Gamble v. Stevenson, supra, 406 S.E.2d at 354.

In deciding whether to award punitive damages, the jury was instructed to assess each of the foregoing factors against each Defendant. Although in case where the master's liability is based on respondent superior some of the foregoing factors may be identical as to both the master and the servant. This is certainly not true as to all of the factors. Most notably, the ability of defendant to pay punitive damages usually will vary where multiple defendants are involved. In the instant case, the record reflects evidence showing that Spartan Radiocasting, Inc. had a net worth of some Eighteen Million ($18,000.000) Dollars. On the other hand, there is absolutely no evidence in the record showing the net worth or ability to pay of Mr. Tedder. The jury quite properly could have assumed that Mr. Tedder lacked the substantial assets of his former corporate employer and could have substantial assets

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[1] *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991).

of his former corporate employer and could have decided in its discretion not to award punitive damages against Mr. Tedder because of the lack of evidence as to his ability to pay.

The jury was also instructed that punitive damages are awarded, inter alia, to deter the defendant from engaging in similar wrongful conduct in the future. See e.g., *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991) ("[t]he law of South Carolina permits jury to award punitive damages to punish, deter, and vindicate the rights of the plaintiff whenever the conduct of the defendant is willful, wanton or reckless"). Although the evidence presented at trial showed that Spartan Radiocasting, Inc. remains in the television news business, the evidence disclosed that Mr. Tedder no longer works for Spartan Radiocasting, Inc.

The jury was also instructed that one of the elements that should be considered in assessing punitive damages is the defendants' awareness or concealment. There was evidence in the record to show that the corporate defendant may have engaged in conduct which amounted to an attempt to hide and/or destroy the evidence. The evidence revealed that after the two broadcasts, the permanent copy of the broadcasts was in fact erased. Additionally, the transcripts of the broadcasts are also "lost or unable to be found." The jury could have found that the corporate defendant, Spartan Radiocasting, Inc. perpetrated the attempt to hide and/or destroy the evidence and the single defendant, Allan Ray Tedder, did not participate in this act of concealment. Hence, the jury could have decided against imposing punitive damages on Mr. Tedder because of the difference in their conduct after the publications had occurred.

The defendants' argument that the verdicts are inconsistent fails to take into account that the foregoing factors differ as to the two defendants. Additionally, there

were other factors that the jury, having listened to this court's charge, most probably took into consideration and decided that the corporate defendant should have punitive damages imposed upon it and not Mr. Tedder. The defendants in effect urge the Court to construe the jury's failure to impose punitive damages on Mr. Tedder as an implicit finding that Mr. Tedder did not act with the wanton conduct necessary to support a punitive damages award.

In *Collins v. Johnson*, 245 S.C. 215, 139 S.E.2d 915 (1965) the South Carolina Supreme Court recognized that a verdict imposing punitive damages on a principal but not on his agent did not necessarily exonerate the agent from willful and wanton conduct. The court explained that the jury could reasonably decide to impose punitive damages on the principal only because of the principal's greater ability to pay:

> Since the jurors were told that punitive damages were left to their sound judgment and discretion, and were correctly charged that the ability of the respective defendants to pay could be taken into consideration ingrading the amount of the punishment, the jurors could well have reasoned that even though Johnson was guilty of willfulness, still under all of the circumstances of the case, including the ability of the defendant Johnson to pay, a verdict against him for punitive damages, in even a small or nominal amount, would be a punishment which, in their sound judgment and discretion, the jurors did not see fit to inflict. The jurors could have further reasoned, in their sound judgment and discretion, that under all of the circumstances, the coach company alone was able to and should pay the amount of $25,000 by way of punishment

> even though Johnson was guilty of willfulness...

139 S.E.2d at 921[2].

Although *Collins* was decided prior to *Gamble v. Stevenson* and the *Collins* record does not disclose whether the jury was instructed as to the other *Gamble* factors, the reasoning employed by the *Collins* court on this point is certainly persuasive. In *Kirby v. Gulf Refining Co.*, 173 S.C. 224, 175 S.E. 535 (1934), the primary case cited by the Defendants in their brief, the Court did not mandate that the verdicts be deemed inconsistent. In that case the evidence and instructions presented below indicated that the jury verdict exonerating the agent from punitive damages amounted to a finding that he was innocent of malice:

> If the agent is exonerated, can the principal be held liable? In other words, the jury have acquitted Livingston of malice in what he did in the premises and have held Gulf Refining Company liable in punitive damages. Malice is the essential ingredient necessary to sustain a verdict for punitive damages. The jury say Livingston, the agent, is innocent of malice,

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[2] In *Collins* the trial court did not find the verdicts to be illogical. On appeal the South Carolina Supreme Court, based on the evidence and instructions in the record, ruled that it agreed with the trial court on this point. This ruling does not, however, mean that all judgments where such verdicts have been rendered are defective. Rather, the *Collins* court in effect found no abuse of discretion in the trial court's determination that the verdicts were illogical based on the record. While the evidence presented in *Collins* may have led the trial court to conclude that the verdicts were illogical, the evidence in the instant case leads to the contrary conclusion. To the extent that *Collins* does support a rule that verdicts of this nature are inconsistent as a matter of law, the Plaintiff submits that *Collins* has been overruled by *Gamble v. Stevenson.*

> but that Gulf Refining Co., who acted alone through its said agent, is guilty of malice. How can that be?

175 S.E. at 537.

> We say here, if [the agent] had no malice in his conduct toward plaintiff, and the jury by their verdict have said he had none, "there was no other chance for... [the principal] to have it."

Id. at 539.

In the instant case, by contrast, there is absolutely no reason to presume from the jury's verdicts that they intended to absolve Mr. Tedder from the wanton conduct necessary to support a punitive damages award. On the contrary, the special interrogatory verdict form clearly showed that the verdict was not inconsistent and not illogic. It is just as logical to presume that the jury found that Mr. Tedder had engaged in conduct sufficiently egregious to justify the imposition of punitive damages but nonetheless declined to impose this sanction on him because of the lack of evidence of his ability to pay, because the jury perceived no need to deter him from future similar conduct and because he was not involved in trying to hide or destroy the evidence. Because the verdicts thus can be reconciled, and because it is the court's duty to attempt to reconcile the verdicts if this can be done reasonably, this court finds the verdicts to be consistent and deny the motion for a new trial on this ground.

This court now addresses the issue of punitive damages. In the recent case of *Gamble v. Stevenson*, _____ S.C. _____, 406 S.E.2d 350 (1991), the Supreme Court of South Carolina established new standards for the trial court's review of punitive damage verdicts.

This court has conducted a post-trial review and has considered the factors and guidelines as set forth by our Supreme Court in the *Gamble* decision. This court, in charging the jury, set forth the factors that the jury may consider in awarding punitive damages, and this court has considered those factors among others and the evidence and testimony in this case in making its decision. The court finds no evidence that the verdict of the jury was the result of arbitrariness, capriciousness, or other factors that would have had an improper impact on the jury's verdict. Taken as a whole, this court finds no reason to alter the jury's punitive damage award.

Of significant importance to this court is the fact that this case involved the intentional tort of defamation and later concealment, as well as denial. As opposed to negligence cases, those involving intentional torts certainly justify punitive damage awards to a much greater degree.

The defendants argue that the punitive damage award of Six Hundred and Twenty-Five Thousand ($625,000) Dollars is excessive because it is twelve and one-half times the Fifty Thousand Dollar actual damage award. The court finds this argument without merit. Indeed, our Supreme Court has held on numerous occasions that even nominal awards of actual damages will support a substantial award of punitive damages. The court finds that the actual damage award of Fifty Thousand ($50,000) Dollars is supported by clear and convincing evidence in the record; and, further, that the punitive damage award of Six Hundred Twenty-Five Thousand ($625,000) Dollars is not excessive. The defendants argue that the award of Six Hundred Twenty-Five Thousand ($625,000) Dollars is excessive; however, the court notes that this amount is 3.4722% of the defendant's net worth of Eighteen Million ($18,000,000) Dollars. Clearly, this is not excessive and the court so finds.

Now, in returning to the factors set forth in *Gamble* and charged to the jury, the court must assume without evidence to the contrary that the jury followed the court's instructions and considered those factors along with other they were advised they could consider. This court, in making its independent review of the punitive damage award based upon those factors, finds that the jury's award was supported by the evidence and testimony in the case.

This court therefore finds as a matter of law that the jury in fact properly considered the guidelines that this court set out in its charge to the jury and, after making an independent review, finds that the jury verdict is proper, is consistent with the guidelines as set out by this court in its charge and the punitive damage award should be affirmed.

NOW, THEREFORE, IT IS ORDERED that all motions of the defendants are denied.

J. DERHAM COLE
RESIDENT JUDGE
SEVENTH JUDICIAL CIRCUIT

Spartanbug, S.C.
December 22, 1992

APPENDIX E

THE COURT: Hand up the verdict, please, sir. All right, sir. To the question of whether or not the jury finds that the plaintiff has proven by a preponderance of the evidence that the broadcasts in question were defamatory, the answer of the jury is yes; to the question of whether or not the jury has unanimously found that the plaintiffs have proven by clear and convincing evidence that the broadcasts complained of by the plaintiff were false, the answer is yes; to the question of whether or not the jury has found unanimously that the plaintiff has proved by clear and convincing evidence that the broadcasts were published by the defendants with actual knowledge of the falsity thereof or with a reckless disregard for the truth or falsity thereof, the answer is yes, to the....

(R. 00476).

APPENDIX F

CONSTITUTIONAL PROVISION INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Constitution Amendment 1.

Supreme Court, U.S.
FILED
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No. 96-1629

IN THE

Supreme Court of the United States

October Term, 1996

HARVEY S. PEELER

Petitioner,

v.

SPARTAN RADIOCASTING, INC.
AND ALLAN RAY TEDDER

Respondents.

On Petition For a Writ Of Certiorari
To The South Carolina Supreme Court

BRIEF IN OPPOSITION

BRUCE W. SANFORD
Counsel of Record

HENRY S. HOBERMAN
DAVID S. WACHEN
MICHAEL J. LORENGER
Baker & Hostetler LLP
1050 Connecticut Ave., N.W.
Washington, DC 20036
(202) 861-1500

Counsel for Respondents

WILLIAM U. GUNN
PERRY D. BOULIER
Holcombe, Bomar, Gunn & Bradford, P.A.
P.O. Box 1897
Spartanburg, SC 29304
(864) 585-4273

Of Counsel

QUESTION PRESENTED

Whether the Court should review the dismissal by the Supreme Court of South Carolina of a libel action brought by a public official when that court, after careful independent review, found that the public official had failed to present clear and convincing evidence of actual malice.

PARTIES TO THE PROCEEDINGS

Petitioner Harvey S. Peeler was the plaintiff in the Court of Common Pleas of Spartanburg County, where this case was initiated. Peeler was the respondent in the appeal to the Supreme Court of South Carolina.

Respondent Spartan Radiocasting, Inc., defendant and appellant below, owns and operates WSPA-TV in Spartanburg, South Carolina. It is a South Carolina corporation with its principal place of business in Spartanburg County, South Carolina.

Respondent Allan Ray Tedder, defendant and appellant below, was a reporter at WSPA-TV during the events at issue.

RULE 29.6 LISTING

Respondent Spartan Radiocasting, Inc. has no parent companies or publicly held, nonwholly-owned subsidiaries.

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IN THE

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HARVEY S. PEELER

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SPARTAN RADIOCASTING, INC.
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Respondents.

On Petition For a Writ Of Certiorari To The South Carolina Supreme Court

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This Petition challenges the unremarkable application by South Carolina's highest court of this Court's well-settled constitutional protections in a public official libel action. In reversing the judgment of the trial court, the Supreme Court of South Carolina held that Petitioner failed to prove by clear and convincing evidence that Respondents acted with actual malice in broadcasting allegedly false and defamatory statements about him.

Rather than offer a compelling reason for this Court to grant his Petition, as required by Supreme Court Rule 10, Petitioner ignores the plain language of the lower court's opinion and contends that the court below "made a *de novo* review of falsity, [and erroneously] applied a clear and convincing evidence standard to the issue of falsity . . . ."

Pet. at 13. The majority of Petitioner's Argument section is devoted to this proposition.

In fact, in a 7-page *per curiam* decision, the Supreme Court of South Carolina explicitly states no less than four times that it was steering clear of falsity and, instead, was conducting a *de novo* review of the record to determine whether Petitioner had proved actual malice by clear and convincing evidence. *See, e.g., Peeler v. Spartan Radiocasting, Inc.*, 478 S.E.2d 282, 284 (S.C. 1996) (*per curiam*) ("[W]e are required to conduct an independent *de novo* review of the record *only* on the issue of actual malice.") (emphasis added). The court went on to recognize, correctly, that the record in this case contains nothing that even approaches clear and convincing evidence of actual malice. But this Court need look no further than the four corners of the decision below to dispatch the Petition.

A. The Facts

This lawsuit arises from two news reports broadcast by Respondent Spartan Radiocasting's television station, WSPA-TV in Spartanburg, South Carolina, concerning the acrimonious 1988 campaign for the District 14 seat in the South Carolina Senate.

When it appeared that Petitioner Harvey S. Peeler would be reelected in an unopposed election, former Cherokee County Councilman J.R. Stroupe decided to mount a late petition drive to put his name on the ballot as a challenger to Peeler. On August 29, 1988, three days before the September 1 petition deadline, several local newspapers reported that there were questions about the authenticity of some of the signatures on Stroupe's petition, resulting in an

investigation by the State Law Enforcement Division ("SLED"). (R. at 142-45, 505.)[1] On that same day, WSPA assigned Respondent Allan Ray Tedder, a WSPA reporter for nearly ten years, to cover the story for that evening's newscast. (R. at 142-43, 242, 328.) Tedder contacted the South Carolina Election Commission, the Cherokee County Election Office, and SLED, which confirmed its investigation. (R. at 144-45.) He also spoke with Stroupe on three separate occasions -- first over the telephone, second in person but off-camera, and finally on-camera; he also interviewed Stroupe supporters. (R. at 169-71, 231-32.) According to Tedder, during his in-person, off-camera conversation with Stroupe, Stroupe said he believed either Peeler or his supporters had caused the forgeries to occur. (R. 151, 171.) Stroupe's supporters echoed the same sentiment, with two supporters also opining that Peeler was involved. (R. at 151, 170-71, 228, 231-32.) Tedder also contacted Peeler, who denied any involvement. (R. at 328-29.)

Tedder prepared a one-minute summary for that evening's six o'clock news. (R. at 332-33.) The report followed a typical television news format for day-to-day campaign coverage: (1) issue; (2) accusation; (3) denial; and (4) "stand-up" closing by reporter. Tedder reported the following:

> **Ray Tedder**: These SLED agents are poring over petitions that have been filed by J.R. Stroupe, a former Cherokee County Councilman who wants to run for the State Senate. The State Election Commission says that twenty people have signed

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[1] "R." refers to the Record On Appeal submitted to the Supreme Court of South Carolina.

> affidavits saying that they didn't sign the petitions; that someone forged their signatures. These agents are trying to find out if there are more. At Stroupe's Service Station near Thickety Mountain, supporters are claiming it's just dirty politics.
> **J.R. Stroupe**: Everything was fine until I asked to see them.
> **Tedder**: Stroupe says he has hundreds of people working for him trying to get enough signatures to get him on the ballot in November, opposite incumbent State Senator Harvey Peeler. He says he doesn't know who might have forged the signatures, but he claims Peeler or his supporters engineered this problem. Peeler says that's nonsense.
> **Harvey Peeler**: The first I heard about it, Ray, was yesterday afternoon. It took me totally by surprise.
> **Tedder**: For election officials, finding out who did it is not as important as finding out how many signatures are valid. They have to certify the petition by September the first. In Gaffney, Ray Tedder, TV-7, Eyewitness News.

Peeler, 478 S.E.2d at 283. Three days later, on September 1, Tedder prepared a one-minute follow-up report about the failure of Stroupe's petition drive. It again followed the familiar campaign coverage format, and contained reactions from the public:

> **Tedder**: According to South Carolina Election Officials, twenty people claim their names were forged on these petitions. That helped keep J.R. Stroupe twenty-seven away from having enough to get on the ballot opposite incumbent State Senator Harvey Peeler. These SLED agents sorting the petitions are continuing to investigate hoping to find

> out who committed the crime. J.R. Stroupe is conducting his own investigation. Stroupe wants to prove he had nothing to do with the forgeries, and the supporters who gathered at his service station believe someone in the Peeler camp set Stroupe up. Peeler says he had nothing to do with it. But Peeler will be hard pressed to convince a lot of people. They believe it's just Cherokee County politics as usual.
>
> **John Gimball**: It wouldn't surprise me. I mean, there's so much things that go on that people won't say nothing about.
>
> **Arthur Hall**: My opinion is that Harvey's got something to do with it.
>
> **Tedder**: Stroupe says he's not decided whether to wage a write-in campaign, but his supporters say they will carry on one with or without his active participation. In Cherokee County, Ray Tedder, TV-7, Eyewitness News.

Id. at 283-84. Although Peeler did not contact Respondents following the airing of the August 29 report, in which he was quoted (R. at 333-34), he visited WSPA on September 2 to complain that he was not contacted for comment prior to the September 1 report. (R. at 334-44, 346, 348.) He did not, however, complain that any of the statements in either broadcast was false. (R. at 369-73.) When the news director at the time, Harvey Cox, offered to broadcast a follow-up report to allow Peeler another opportunity to respond, Peeler declined the offer. (R. at 275.)

Senator Peeler was reelected to the South Carolina Senate in November 1988. (R. at 360-61.)

B. The Lawsuit

For nearly two years after Senator Peeler's reelection, WSPA heard nothing further about the broadcasts from Peeler. On August 8, 1990, he filed a Complaint alleging that he had been defamed by the two broadcasts, but failed to identify the specific statements alleged to be false and defamatory. On June 5, 1992, Respondents moved for summary judgment on the grounds that neither broadcast contained any false statement, and that even if there had been a false statement, there was no evidence that it had been made with actual malice. The trial court denied the motion with little explanation.

On June 15, 1992, a five-day trial began. Peeler introduced the videotape of the two reports. As to the August 29 report, Tedder testified that Stroupe had told him during their off-camera conversation that he believed Peeler or his supporters had committed the forgeries. (R. at 151, 171.) Because Peeler neglected to call Stroupe as a witness, Peeler was unable to offer any affirmative evidence that Stroupe had not made the accusation against Peeler.[2]

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[2] Thus, Petitioner misrepresents the evidence when he claims that "the evidence presented at trial showed that Stroupe never made the accusation and that Tedder knew this." (Pet. at 2.) Indeed, later in the Petition he concedes that Tedder testified at trial that the accusation occurred off-camera, and that Haynes Mullinax, who was "*present* at the grocery store when Tedder talked with Stroupe," was not privy to that conversation, having "*observed* the on-camera interview" only. (Pet. at 3 (emphasis added).) In addition, Petitioner neglects to mention that, at one time, he sued Stroupe for libel based solely on the statement that he now claims Stroupe never made. (R. at 517-29.) In support of his motion for summary judgment in that case, Petitioner stated in a sworn affidavit that Stroupe had in fact accused him of forgery. (R. at 530 ¶ 2(b).)

With regard to the September 1 broadcast, which was taped by WSPA and voluntarily provided to Petitioner by WSPA at the September 2 meeting, (R. at 112, 349-50), Petitioner insisted that the report on the videotape was not the one that actually aired. The "real" broadcast, he told the jury, was worse because the station's tape did not include the anchor's "lead-in." (R. at 247-48, 349.) To support his contention that the "real" broadcast was worse than the one before the jury, Peeler offered hearsay testimony that his mother told him that the September 1 newscast contained a still picture of him in addition to Tedder's report. (R. at 334-35.) Since he had not seen the news that evening, Peeler was unable to confirm his mother's recollection. (R. at 334-35.)

Peeler then suggested to the jury that Tedder and WSPA had destroyed the supposed "worse" videotape. Peeler brought back former news director Harvey Cox, who had since been terminated by WSPA. (R. at 267, 275.) Cox testified that an air-check tape[3] of the September 1 newscast could not be located. He speculated that the air-check might have been erased, but did not explain how he eliminated the equally plausible possibility that the September 1 newscast had never been recorded. (R. at 249-50.) However, he did testify that "he did not mean to suggest that he thought that Tedder had [erased it.]" (R. at 268.)

At the close of Peeler's case, Respondents moved for a directed verdict, arguing that Peeler had not met his

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[3] Many television stations make a real-time tape of their programs as they are broadcast, called an "air-check." There is no legal requirement that television stations make or retain "air-check" tapes, and such tapes often are unavailable or of poor quality. (R. at 271.)

burden of proving by clear and convincing evidence that a false and defamatory statement had been made with actual malice. (R. at 387-91, 393-401.) The motion was denied. (R. at 408-09.) Convinced that Peeler had not come close to meeting the weighty constitutional burdens facing a public official libel plaintiff, Respondents chose not to offer any testimony. (R. at 410.)

The trial court's instructions to the jury were long and complex. The trial judge gave the jury two different definitions of "actual malice." First he instructed the jury that "actual malice" means knowingly or recklessly publishing false statements.[4] Later in his instructions, he told the jury that actual malice means conduct that is "willful, wanton, or reckless or a conscious indifference or a reckless disregard of the rights of others." (R. at 421, 430.)

Not surprisingly, after approximately two hours of deliberations, the jury was baffled. It asked the court for "[t]he definitions such as defamatory, preponderance, words like that that were called out in here," and a copy of the written charge. (R. at 459-60.) Instead of providing one, the judge read the entire charge again, including the instructions on presumed damages and both definitions of actual malice. (R. at 459-74.) Respondents' counsel requested that the jury be provided with a written copy of the definition of actual malice as it relates to liability. The trial court rejected the request. (R. at 475.)

---

[4] The trial judge failed to abide by this Court's admonition that "[i]n place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity." *Masson v. New Yorker Magazine*, 501 U.S. 496, 511 (1991).

The same day, the jury returned a verdict for Peeler and awarded $50,000 in actual damages and $625,000 in punitive damages. (R. at 476-77.) Respondents promptly moved for judgment notwithstanding the verdict, a new trial, a new trial *nisi* as to both actual and punitive damages, and an independent review of the punitive damage verdict. (R. at 477-79.)

On December 22, 1992, the trial court denied all of Respondents' post-trial motions with no explanation other than the conclusory statement that there was "sufficient evidence" to support the jury's verdict. (R. at 6.) The trial court also reviewed the punitive damage verdict and held that it was "proper." (R. at 14-15.)

C. The Appeal

On January 13, 1993, Respondents appealed to the Supreme Court of South Carolina. After full briefing by the parties, the court heard argument on November 16, 1994. Thirteen months later -- on December 19, 1995 -- the court informed the parties that Justice Toal, a member of the panel who had heard argument, had decided to recuse herself. Justice Toal's husband, an attorney in private practice, had been retained by Petitioner's counsel to handle his domestic relations situation shortly *after* the court heard oral argument in this case. *See* Motion for Reargument and Memorandum in Support, filed Jan. 31, 1996. This served as the basis for Justice Toal's recusal.

Respondents moved for reargument, which was granted. A judge from the South Carolina Court of Appeals sat in Justice Toal's place at the second argument. The reconstituted panel heard argument on April 16, 1996.

On November 18, 1996, the court reversed the jury's verdict for Petitioner, finding after conducting *de novo* review that Petitioner had failed to prove actual malice by clear and convincing evidence. *Peeler*, 478 S.E.2d at 285. As to the August 29 report, the court found that,

> At best, Tedder may have practiced sloppy journalism by referring to Peeler rather than only his supporters, however, there is no evidence in the record that he did so with actual malice.

Id. As to the September 1 follow-up report, the court said,

> The testimony of [Hall and Gimball] does not clearly show that Tedder deliberately misrepresented his interviews with them. Tedder's comment prior to airing these quotes may have been ambiguous ["a lot of people . . . believe it's just Cherokee County politics as usual."], but without additional evidence, we hold this does not amount to clear and convincing evidence of actual malice.

Id. In announcing its decision, the court explicitly rejected Respondents' argument that it was required to conduct an independent review of the record to determine whether Petitioner had proven falsity by clear and convincing evidence. Instead, the court accepted Petitioner's argument that it was "required to conduct an independent *de novo* review of the record *only* on the issue of actual malice." *Id.* at 284 (emphasis added). On January 13, 1997, the Supreme Court of South Carolina denied Petitioner's request for a rehearing. This Petition followed.

REASONS FOR DENYING THE WRIT

I. RATHER THAN PRESENT A COMPELLING REASON TO GRANT CERTIORARI, PETITIONER MANUFACTURES A PHANTOM OPINION OF THE SUPREME COURT OF SOUTH CAROLINA THAT IS AT ODDS WITH THE PLAIN LANGUAGE OF THE REAL OPINION.

Petitioner asks this Court to re-do the careful, *de novo* work of South Carolina's highest court in assessing evidence of actual malice in an ordinary public official libel case. *Peeler*, 478 S.E.2d at 284. Petitioner does not quarrel with the existing constitutional standard. He does not dispute that he is a public official, that he bears the constitutional burden of proving actual malice, that he must prove actual malice by clear and convincing evidence, that the Supreme Court of South Carolina properly defined the term actual malice, or that the court was required to conduct an independent review of the record on actual malice. Nor does he advocate a departure from, or even an extension of, these established principles.

Instead, he puts words in the mouths of South Carolina's Justices, asserting that they conducted a *de novo* review of the evidence of falsity, not actual malice, and erroneously applied the clear and convincing standard to their phantom falsity analysis. The Justices said, and did, no such thing. Petitioner ignores at least 4 unambiguous statements by the court:

- We agree our scope of review *on the issue of actual malice* is a *de novo* review to determine if there is clear and convincing evidence. *However, we do not agree this is the proper scope of review on the issue of falsity*. *Id.* at 284 (emphasis added).

- [W]e are required to conduct an independent *de novo* review of the record *only* on the issue of actual malice. *Id.* (emphasis added).

- At oral argument, appellants in essence stated if we declined to adopt a *de novo* review on the evidence of falsity, [which the court has done,] *the focus of this appeal should be on whether there is clear and convincing evidence of actual malice*. *Id.* at 284 n.5 (emphasis added).

- Pursuant to a *de novo* review of the record, we hold there is not clear and convincing evidence to support a finding of actual malice. *Id.* at 285.

This Court simply does not disregard the plain language of lower court decisions, or re-plow fields that have already been tilled by a State's highest court. *See Texas v. Mead*, 465 U.S. 1041, 1043 (1984) ("We do not grant a certiorari to review evidence and discuss specific facts") (quoting *United States v. Johnston*, 268 U.S. 220, 227 (1925)); Sup. Ct. R. 10 ("A petition . . . is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). Petitioner's plea for relief amounts to nothing more than an argument that the lower court did not mean what it

actually said, and that it misapplied a properly stated rule of law.[5] These are hardly the "compelling" reasons for certiorari contemplated by Rule 10.

II. THE SUPREME COURT OF SOUTH CAROLINA PROPERLY FOUND THAT PETITIONER FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENTS ACTED WITH ACTUAL MALICE.

Spirited accusations of political chicanery, trenchant barbs between candidates, finger pointing, lawsuits -- this, unfortunately, is the familiar face of politics and electioneering in America today. The District 14 race for State Senate in South Carolina had it all, and reporter Ray Tedder did his best to report on the accusations, the ensuing investigation by a state agency, and the predictable denials from both camps. This is not the stuff of actual malice.

The decades-old actual malice rule was virtually tailor-made to protect news reporting about hard-fought,

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[5] After erroneously arguing that the Supreme Court of South Carolina conducted a review of falsity, not actual malice, Petitioner suggests that the court should not have used the clear and convincing standard in its falsity analysis. Even if the court *had* conducted a review of falsity, which it did not, and *had* applied the higher evidentiary standard for that review, which it did not, such a decision would fall within the court's discretion and this Court's First Amendment jurisprudence. This Court has set the *minimum* standards required to satisfy the Constitution; "[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 1190 (1995).

emotionally-charged local elections like this one. The actual malice yardstick in part reflects the recognition that the press must be free to cover even the most raucous political campaigns and activities without fear of liability for mere negligence. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 687 (1989); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). As the Fourth Circuit recently observed:

> In the hurly burly of political and scientific debate, some false (or arguably false) allegations fly. The press, however, in covering these debates, cannot be made to warrant that every allegation that it [publishes] is true. If this burden were imposed through the law of defamation, news organizations would become ever more officious referees in the ring of robust debate, and the free exchange of views would be diminished to the public detriment.

Reuber v. Food Chem. News, Inc., 925 F.2d 703, 717 (4th Cir.) (citations omitted), *cert. denied*, 501 U.S. 1212 (1991).

To recover for libel, therefore, a public official has the burden of proving by clear and convincing evidence that any allegedly defamatory statements about him were published with knowledge that the statements were false or with "a 'high degree of awareness of . . . [their] probable falsity.'" *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (citation omitted); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 n.6 (1974) (reckless disregard is "equated . . . with subjective awareness of probable falsity"); *New York Times Co.*, 376 U.S. at 279-80.

After full briefing, two oral arguments, and a *de novo* review of the complete record, the Supreme Court of South Carolina found that a public official embroiled in a tough re-election campaign had failed to meet his heavy burden of proving actual malice by clear and convincing evidence. The record fully supports the court's determination.

A. The August 29 Report

In his August 29 report, reporter Ray Tedder described some of the developments in the heated District 14 State Senate race to the viewers of Cherokee County. In a one-minute report, he conveyed the allegations of campaign fraud, the pending investigation by the state agency charged with overseeing the election, and the positions of both candidates on the allegations. *See In re UPI*, 106 Bankr. 323, 330 (D.D.C. 1989) (publishing accused's denial eliminates risk publisher will be viewed as endorsing reported charge). He paraphrased a private, off-camera conversation he had with J.R. Stroupe, in which Stroupe told Tedder that he believed that Peeler or his supporters had "caused these forgeries to occur." (R. at 151, 169-71.)

Petitioner does not dispute that Stroupe and his supporters accused Peeler's *supporters* of having "engineered this problem." Pet. at 4. The only issue he raised at trial, and again on this appeal, was whether Stroupe also accused Peeler himself. Petitioner even concedes that four local newspapers had previously reported that "Stroupe had accused Peeler's supporters of involvement in the forgeries." Pet. at 5.

At trial, Petitioner did not produce any direct evidence that Tedder had deliberately misreported Stroupe's accusation. Tedder testified that Stroupe had told him

shortly before broadcast that he suspected that Peeler or his supporters were behind the forgeries. (R. at 170-71.) Remarkably, Petitioner did not call Stroupe as a witness to refute Tedder's recollection that Stroupe had told Tedder that he believed Peeler was involved. In fact, Petitioner offered *no* evidence that anyone at WSPA questioned whether Stroupe had made the charge. And Tedder testified that, even after four years, he still believed that the broadcasts were fair and accurate reports of what Stroupe told him.[6] (R. at 151, 167.)

Petitioner's only evidence that purported to show actual malice was second-hand testimony about *Stroupe's* bias and state of mind (not Tedder's) at the time of the interview, and allegations that Tedder somehow "staged" the on-camera appearance. Alone or collectively, these allegations do not come close to proving actual malice by clear and convincing evidence.[7]

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[6] Petitioner calls into question Tedder's credibility in an attempt to bolster his sagging actual malice argument. But, questioning Tedder's credibility is not tantamount to providing affirmative evidence of actual malice. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 512 (1984) ("discredited testimony is not considered a sufficient basis for drawing a contrary conclusion"); *Secord v. Cockburn*, 747 F. Supp. 779, 793 n.10 (D.D.C. 1990) (questioning plausibility of defendant's testimony is not sufficient for fulfilling "affirmative duty" to prove actual malice). Moreover, Petitioner distorts the record in saying that Tedder, at his deposition, could only remember Stroupe accusing Peeler's supporters. (Pet. at 3-4.) In fact, Tedder remembered Stroupe saying "what we said in the story." (R. at 154.)

[7] Petitioner also urges that Respondents' supposed motive to "scoop" the competition is evidence of actual malice. (Pet. at 22.) This Court has rejected a similar theory. *See Harte-Hanks*, 491 U.S. at 667.

Stroupe's bias or state of mind is irrelevant to *the publisher's* subjective belief that the accusation was made. *See Reuber*, 925 F.2d at 715 ("[a]ctual malice cannot be proven simply because a source of information might also have provided the information to further the source's self-interest"). Likewise, Petitioner's assertion that Stroupe's on-camera appearance was "staged," simply because Stroupe donned a clean shirt and sunglasses for the broadcast, is, at best, irrelevant hyperbole. Petitioner did not even establish at trial that Tedder had orchestrated Stroupe's appearance. (R. at 181, 229-30.) Even if Petitioner had proven that Tedder provided a shirt and sunglasses to Stroupe, these actions would be inconsequential. Taking reasonable steps to improve the quality of a broadcast is "essentially neutral," and certainly far afield of the clear and convincing evidence required to prove actual malice. *See, e.g., Perez v. Scripps-Howard Broadcasting Co.*, 520 N.E.2d 198, 204 (Ohio) (rehearsal of questions does not affect actual malice determination), *cert. denied*, 488 U.S. 870 (1988); *Silvester v. American Broadcasting Cos.*, 650 F. Supp. 766, 779 (S.D. Fla. 1986) (allowing witnesses who support reporter's "thesis" to rehearse and retape without giving same opportunity to others does not "rise to the level of constitutional malice"), *aff'd*, 839 F.2d 1491 (11th Cir. 1988).

Based on this record, the Supreme Court of South Carolina reached the unsurprising conclusion that evidence about the state of mind of someone other than the publisher, coupled with the unproven allegation that a reporter took steps to make his broadcast look better, is not clear and convincing proof of actual malice.

B. The September 1 Report

In his follow-up report of September 1, Tedder again included comments from both camps, as well as "sound-bites" from two citizens -- Gimball and Hall -- supporting the unremarkable conclusion that some members of the public viewed the petition controversy as "Cherokee County politics as usual." Petitioner claims that Tedder acted with actual malice because he edited the interviews with Gimball and Hall and, Petitioner claims, took portions of the interviews "out of context."

The record does not support Petitioner's claims. Tedder testified that he asked Gimball and Hall open-ended questions. (R. at 192-93.) He also stated that he understood Hall to say that Peeler might have had something to do with the forgeries or the investigation. (R. at 186-87, 196-97.) Although Hall testified that he had not intended to refer to the forgeries, he admitted that Tedder could have asked about them. (R. at 239-40.) The broadcast itself is at best ambiguous as to whether Hall's statement refers to the investigation or forgeries. Gimball testified that his principal gripe was that his sound-bite "was just one little segment of what we had discussed." (R. at 129.) He did, however, acknowledge that at the time he was interviewed, there were people who would have thought that Peeler or his associates were involved in the controversy. (R. at 136-37.)

Petitioner apparently quibbles with Tedder's editing decisions, suggesting that the broadcast should have contained more of the Gimball and Hall interviews. This argument ignores the realities and constraints of television news, and also threatens the time-honored tradition of leaving editing decisions to those in newsrooms, not courtrooms. *See Tavoulareas v. Piro*, 817 F.2d 762, 796

(D.C. Cir.) (*en banc*) (Courts "do not sit 'as some kind of journalism review seminar offering our observations on contemporary journalism and journalists.'") (citation omitted), *cert. denied*, 484 U.S. 870 (1987). As one court explained, "In any broadcast, there will be a selection made as to what is newsworthy. The relevant question is whether that selection is made with a view toward dissemination of false information." *Perez*, 520 N.E.2d at 204 (citations omitted). Here, the record contains ample evidence that only two factors were considered when the broadcast was edited: clarity and length of time. (R. at 168, 201.) There is no evidence that Tedder edited the Gimball and Hall interviews with anything but good faith, let alone "with a view toward dissemination of false information," *Perez*, 520 N.E.2d at 204, or with the intent to quote Gimball and Hall out of context.[8]

This Court's decision in *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991), prominently featured in the Petition, is not to the contrary. In *Masson*, the petitioner, seeking reversal of the lower court's grant of summary judgment, pointed to evidence in the record of *wholesale and*

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[8] The "missing" air-check tape and the testimony of a fired news director add nothing of constitutional significance to the Petition. Petitioner claims that Respondents intentionally erased the air-check to hide unfavorable evidence, but he failed to prove at trial that the tape was deliberately erased. *See Peeler*, 478 S.E.2d at 285 (Petitioner failed to prove erasure was not routine, negating possibility of actual malice). Even the former news director, Harvey Cox, fired by the station before trial, did not believe that Tedder had erased the air-check. (R. at 268-69.) Similarly, Cox's "expert" opinion that Gimball and Hall's comments may have been taken out of context, based entirely on his impressions of what Hall and Gimball said at trial, (R. at 255), does not address state of mind *at the time of the broadcast*. *See New York Times Co.*, 376 U.S. at 287.

deliberate fabrication of quotations that the petitioner brought to the attention of the respondent-magazine's fact-checker prior to publication. *Id.* at 500. This Court found that the evidence in the record, taken in the light most favorable to the petitioner, raised a genuine issue of material fact as to actual malice and falsity, precluding summary judgment. *Id.* at 521. In making this determination, the Court held

> that a *deliberate* alteration of the words uttered by a *plaintiff* does not equate with knowledge of falsity . . . unless the alteration results in a material change in the meaning conveyed by the statement.

Id. at 517 (emphasis added) (citations omitted).

Here, unlike *Masson*, there is no evidence of fabrication or alteration, no evidence of *deliberate* fabrication or alteration, no evidence of pre-publication knowledge of falsity, and no evidence of any "material change in meaning" of the broadcast resulting from Tedder's editing decisions. *Id.* As the Supreme Court of South Carolina correctly recognized, the testimony in this case "does not clearly show that Tedder *deliberately* misrepresented his interviews with [Gimball and Hall]," *Peeler*, 478 S.E.2d at 285 (emphasis added), and therefore does not rise to the level of clear and convincing evidence that Tedder edited the September 1 broadcast with actual malice.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition.

Respectfully submitted,

Bruce W. Sanford
Counsel of Record

Henry S. Hoberman
David S. Wachen
Michael J. Lorenger
Baker & Hostetler LLP
1050 Connecticut Ave., N.W.
Washington, DC 20036
(202) 861-1500

Counsel for Respondents

William U. Gunn
Perry D. Boulier
Holcombe, Bomar, Gunn & Bradford, P.A.
P.O. Box 1897
Spartanburg, SC 29304
(864) 585-4273

Of Counsel